STATE OF MICHIGAN

IN THE SUPREME COURT

JOANN KUSMIERZ, KERRY KUSMIERZ, KIM LINDEBAUM, and **JAMES B. LINDEBAUM,**

Plaintiffs-Appellees,

v

JOYCE SCHMITT and **DIANE RANKIN,**

Defendants-Appellants,

and

RONALD SCHMITT,

Defendant.

Supreme Court
No. _____

Court of Appeals
No. 258021 cp 11/15/05

Bay County Circuit Court
No. 01-3467-CZ-C
W. Capratho

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APPL

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APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF QUESTIONS INVOLVED

I. **WAS IT PERMISSIBLE FOR THE TRIAL COURT TO MAKE AN ADDITIONAL AWARD OF ATTORNEY FEES AS CASE EVALUATION SANCTIONS IN THIS CASE, WHERE EVIDENCE SUPPORTING PLAINTIFFS' CLAIM FOR ATTORNEY FEES AS AN ELEMENT OF DAMAGES HAD BEEN PRESENTED TO THE JURY AT TRIAL, THE JURY HAD RENDERED ITS AWARD OF ATTORNEY FEES BASED UPON THE EVIDENCE AND PROPER INSTRUCTIONS, AND THE TRIAL COURT HAD DENIED PLAINTIFFS' MOTION FOR ADDITUR RELATING TO THE CLAIMED INSUFFICIENCY OF THE ATTORNEY FEES AWARDED BY THE JURY?**

The trial court has answered this question "Yes."

The Court of Appeals did not address this question.

The Defendants–Appellants contend the answer is "No."

II. **DID THE COURT OF APPEALS ERR IN FINDING THAT PLAINTIFFS JAMES AND KIM LINDEBAUM WERE ENTITLED TO AN AWARD OF CASE EVALUATION SANCTIONS IN THIS CASE, WHERE THE ADJUSTED VERDICT WAS LESS THAN THE LUMP-SUM AWARD ELECTED BY THE PLAINTIFFS PURSUANT TO MCR 2.403(H)(4)?**

The Defendants–Appellants contend the answer is "Yes."

III. **WAS IT PERMISSIBLE FOR THE TRIAL COURT TO CONSIDER ITS POST-TRIAL AWARD OF INJUNCTIVE RELIEF AS A BASIS FOR AN AWARD OF CASE EVALUATION SANCTIONS IN THIS CASE?**

The trial court has answered this question "Yes."

The Court of Appeals has answered this question "No."

The Defendants–Appellants contend the answer is "No."

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IV. IS DEFENDANT JOYCE SCHMITT ENTITLED TO AN AWARD OF CASE EVALUATION SANCTIONS AGAINST ALL OF THE PLAINTIFFS?

The trial court has answered this question "No."

The Court of Appeals has answered this "No."

The Defendants–Appellants contend the answer is "Yes."

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THE ORDERS APPEALED FROM AND RELIEF SOUGHT

This Application for Leave to Appeal has arisen from a bitter family dispute. Plaintiffs Joann Kusmierz and James Lindebaum are brother and sister, and Plaintiffs Kerry Kusmierz and Kim Lindebaum are their spouses. Defendants Joyce Schmitt and Diane Rankin are sisters of Plaintiffs Joann Kusmierz and James Lindebaum. Defendant Ronald Schmitt, who has not been a party to the appellate proceedings, is the husband of Joyce Schmitt.

In June of 2001, Plaintiffs filed suit against Defendants in the Bay County Circuit Court, alleging claims of Defamation, Intentional Infliction of Emotional Distress, Invasion of Privacy, and Intentional Interference with Advantageous Business Relationships. In the circuit court, the case was assigned to the Honorable William J. Caprathe, Circuit Judge.

A jury trial was conducted in this case in April of 2003. At the conclusion of the trial, the jury rendered a verdict in favor of the Plaintiffs against the Defendants. A written final Judgment in Plaintiffs' favor (the first final judgment in this matter) was subsequently entered on February 10, 2004.[1] A separate order granting Plaintiffs' post-trial motion for injunctive relief had been entered the day before, on February 9, 2004.[2]

Following the entry of the final Judgment, Plaintiffs filed a motion for case evaluation sanctions against Defendants Joyce Schmitt and Diane Rankin. Defendants filed a response in opposition, and Defendant Joyce Schmitt filed her own motion requesting an award of case evaluation sanctions against the Plaintiffs. By a written Order entered on August 31, 2004,

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[1] A copy of the trial court's Judgment of February 10, 2004 is submitted herewith as Appendix "A."

[2] A copy of the trial court's February 9, 2004 Order for Injunctive Relief is submitted herewith as Appendix "B."

the trial court awarded the Plaintiffs case evaluation sanctions in the amount of $67,259.60.[3] By an Amended Order subsequently entered on September 8, 2004, the court clarified that the award of case evaluation sanctions was against Defendants Diane Rankin and Joyce Schmitt only, and denied Defendant Joyce Schmitt's motion for case evaluation sanctions.[4]

Defendants Joyce Schmitt and Diane Rankin appealed the trial court's post-judgment Orders of August 31, 2004 and September 8, 2004 to the Court of Appeals as of right. Their Claim of Appeal was timely filed on September 20, 2004. Thus, the Court of Appeals had jurisdiction pursuant to MCL 600.308(1)(a), MCR 7.203(A)(1), and MCR 7.202(6)(a)(iv).

The Defendants raised three claims of error in their appeal to the Court of Appeals. In their first issue, they contended that the trial court had improperly relied upon its order granting Plaintiffs' post-trial motion for injunctive relief as a basis for its award of case evaluation sanctions. Specifically, they contended that: 1) MCR 2.403(O)(5) did not permit the trial court to consider its supplemental order for injunctive relief to determine Plaintiffs' entitlement to case evaluation sanctions in this case; 2) The trial court's post-trial order for injunctive relief was improperly considered a part of the "verdict" for purposes of determining liability for case evaluation sanctions under MCR 2.403(O)(1); 3) It was inappropriate for the trial court to consider its supplemental order for injunctive relief as a basis for an award of case evaluation sanctions because Plaintiffs had made no request for injunctive relief in their pleadings, and thus, the case evaluators had not considered any such request in determining their award; and 4) The trial court's reliance upon its post-trial order for injunctive relief as a

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[3] A copy of the trial court's August 31, 2004 Order Granting Case Evaluation Sanctions is submitted herewith as Appendix "C."

[4] A copy of the trial court's September 8, 2004 Amended Order Granting and Denying Case Evaluation Sanctions is submitted herewith as Appendix "D."

necessary basis for its award of case evaluation sanctions was not "fair under all the circumstances," as required by MCR 2.403(O)(5)(b).

In their second claim of error, Defendants contended that the trial court's award of attorney fees as case evaluation sanctions had impermissibly infringed upon Defendants' constitutionally guaranteed right to trial by jury in this case, where evidence supporting plaintiffs' claim for attorney fees as an element of damages had been presented to the jury at trial, the jury had rendered its award of attorney fees based upon the evidence and proper instructions, and the trial court had denied plaintiffs' motion for *additur* relating to the claimed insufficiency of the attorney fees awarded by the jury.

In their third claim of error, Defendants contended that the trial court had erred in denying Defendant Joyce Schmitt's motion for case evaluation sanctions because Ms. Schmitt had improved her position at trial, while the Plaintiffs did not.

On November 15, 2005, the Court of Appeals reversed the trial court's orders and remanded the case to the trial court for further proceedings in an Opinion designated for publication.[5] In its Opinion, the Court of Appeals agreed that Defendants were "technically correct in arguing that MCR 2.403(O)(5) does not, by its terms, contemplate the situation presented here," but concluded that "the trial court did not err in using MCR 2.403(O)(5) as a guide for this case, even though, by its terms, it does not technically apply." (Appendix "E" p. 6) The Court also rejected Defendants' argument that the trial court's supplemental order for injunctive relief did not constitute a part of the "verdict" for purposes of determining liability for case evaluation sanctions. (Appendix "E" p. 6) Nonetheless, the Court of Appeals

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[5] A copy of the November 15, 2005 Opinion of the Court of Appeals is submitted herewith as Appendix "E." The Court's Opinion has been reported at 268 Mich App 731.

concluded that it was not fair "under all the circumstances" for the trial court to consider its supplemental award of injunctive relief as a basis for its award of case evaluation sanctions because: 1) The Plaintiffs' claim for injunctive relief was not considered by the case evaluators, and 2) The jury had awarded attorney fees as an element of damages, and its award had been upheld against Plaintiffs' motion for *additur*:

> "Defendants next argue that consideration of the value of equitable relief to award sanctions in this case is not "fair . . . under all of the circumstances." MCR 2.403(O)(5)(b). We agree, for a couple of reasons.
>
> "First, MCR 2.403(K)(3) allows case evaluators to consider claims for equitable relief ("The evaluation may not include a separate award on any claim for equitable relief, but the panel may consider such claims in determining the amount of an award."). Thus, evaluators presented with a case in which the plaintiffs seek "equitable relief" may place a value on that relief and augment the overall evaluation award accordingly. That approach makes legitimate a later comparison between the evaluation and a verdict that also includes a value for equitable relief. Defendants maintain that the case evaluation panel did not consider plaintiffs' request for injunctive relief when it issued its decision, and that certainly appears to be the case. Plaintiffs' complaint and amended complaint did not mention any request for injunctive relief, and the trial court was simply mistaken in suggesting that these pleadings were sufficiently vaguely or broadly worded to constitute such a request. Because the value of injunctive relief was not considered by the evaluators, the case evaluation in favor of plaintiffs may well have come in artificially low and, as a result, the difference between it and the verdict (which did include the value of injunctive relief) was greater than it should have been.
>
> "Further, as summarized above, the jury heard evidence and arguments regarding plaintiffs' claims for attorney fees under MCL 600.2911(7) and rendered an award of attorney fees after being properly instructed. The jury's decision in this regard was reviewed and found appropriate by the trial judge in denying plaintiffs' motion for additur. In light of that, it was not "fair . . . under . . . the circumstances" of this case for the trial court to later award additional attorney fees as actual costs under MCR 2.403(O)(5). Under the circumstances of this case, we conclude that the trial court erred by taking into account the value of the equitable relief it had ordered in awarding costs against defendants under MCR 2.403(O)(5).
>
> (Appendix "E" p. 7)

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The Court of Appeals did not address Defendants' argument that the trial court's additional award of attorney fees as case evaluation sanctions impermissibly infringed upon their constitutionally guaranteed right to trial by jury. And, despite its finding that it was not fair "under all the circumstances" for the trial court to award case evaluation sanctions based upon its supplemental order for injunctive relief in light of the jury's prior award of attorney fees as an element of damages, the Court of Appeals ultimately concluded that it was, nevertheless, appropriate to award case evaluation sanctions in favor of Plaintiffs James and Kim Lindebaum. The Court determined, however, that the trial court had improperly failed to base its award upon a comparison of the amounts of the evaluation and verdict as to particular pairs of parties. Thus, applying its own methodology for calculating a proportional apportionment of the individual evaluations and adjusted verdict among the parties, the Court determined that Defendants Schmitt and Rankin were liable for payment of case evaluation sanctions to Plaintiffs James and Kim Lindebaum, while Plaintiffs Joann and Kerry Kusmierz were liable for payment of case evaluation sanctions Defendants Schmitt and Rankin. (Appendix "E" pp. 7-10)

Having made these determinations, the Court of Appeals ordered that the case be remanded to the trial court for further consideration and entry of new orders consistent with its Opinion. (Appendix "E" p. 10)

On December 6, 2005, Defendants Schmitt and Rankin filed a timely Motion for Reconsideration of the November 15, 2005 decision of the Court of Appeals. In that motion, Defendants reminded the Court that it had neglected to address their claim that the trial court's supplemental award of attorney fees as case evaluation sanctions had impermissibly infringed upon their constitutional right to jury trial, and asked that the Court grant

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reconsideration to consider and rule upon that issue. Defendants' Motion for Reconsideration also challenged the Court's methodology for apportionment of the awards and adjusted verdict between the individual pairs of parties. Defendants noted, in this regard, that the Court's methodology was inconsistent with the language of the pertinent court rules, unsupported by reported authority, and fundamentally unfair to the Defendants, who were never afforded an opportunity to accept or reject separate awards for individual Plaintiffs.[6]

On January 13, 2006, the Court of Appeals entered its Order denying Defendants' Motion for Reconsideration.[7]

Defendants Schmitt and Rankin now seek leave to appeal the aforementioned decisions of the trial court and the Court of Appeals to this Honorable Court, or other appropriate peremptory relief in lieu of granting leave to appeal, pursuant to MCR 7.302. Specifically, Defendants request that the decision of the Court of Appeals be reversed, and that this case be remanded to the circuit court with instructions to award case evaluation sanctions in favor of Defendant–Appellant Joyce Schmitt.

For all of the reasons discussed in greater detail *infra*, Defendants respectfully contend that case evaluation sanction cannot be awarded in favor of the Plaintiffs in this case because the adjusted verdict is less than the lump-sum award that the Plaintiffs elected pursuant to MCR 2.403(H)(4), and because any further award of attorney fees as case evaluation sanctions would impermissibly deny the Defendants their constitutionally guaranteed right to

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[6] In a separate Application for Leave to Appeal, the Plaintiffs have also expressed their disapproval of the apportionment methodology devised by the Court of Appeals in its Opinion of November 15, 2005. That Application, filed on December 22, 2005, is currently pending before this Court under Docket No. 130187.

[7] A copy of the Court's January 13, 2006 Order denying Defendants' Motion for Reconsideration is submitted herewith as Appendix "F."

have Plaintiffs' damages determined by the jury. Additionally, although the Court of Appeals correctly determined that it was inappropriate, in this case, for the trial court to base its award of case evaluation sanctions upon its post-trial grant of injunctive relief, its construction of the pertinent court rule provisions is seriously flawed. As Defendants have unsuccessfully argued, in their Motion for Reconsideration, the Court's newly created methodology for apportionment of the evaluation and the adjusted verdict to determine liability for case evaluation sanctions is inconsistent with the language of the applicable court rules, unsupported by reported authority, and fundamentally unfair to the Defendants, who were never afforded an opportunity to accept or reject separate awards for individual Plaintiffs.

The decision of the Court of Appeals is clearly erroneous for all of these reasons, and will perpetuate a serious injustice to the Defendants if this Court does not grant leave to appeal or other appropriate peremptory relief. And, because that decision has been designated for publication, it will cause similar injustices in future cases if permitted to stand. For these reasons, it is also evident that the issues presented in this application involve issues of major significance to Michigan's jurisprudence.

This case presents an opportunity, and an urgent need, to reaffirm the supremacy of the constitutionally protected right to jury trial, and to correct erroneous interpretations of this Court's important case evaluation court rules. Defendants respectfully suggest that this opportunity should be seized by granting their application for leave to appeal or other appropriate peremptory relief.

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STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

As noted previously, Plaintiffs filed suit against Defendants in the Bay County Circuit Court, alleging claims of Defamation, Intentional Infliction of Emotional Distress, Invasion of Privacy, and Intentional Interference with Advantageous Business Relationships.[8] In the circuit court, the case was assigned to the Honorable William J. Caprathe, Circuit Judge. Plaintiffs' Complaint requested a money judgment, but contained no request for any form of equitable relief. Plaintiff's Complaint also contained a separate demand for jury trial.[9]

The case was submitted to case evaluation pursuant to MCR 2.403 on June 20, 2002. The case evaluators rendered a single award of $25,000.00 in favor of all Plaintiffs against Defendants Joyce Schmitt and Diane Rankin, and found no cause of action against Defendant Ronald Schmitt.[10] In accordance with MCR 2.403(K)(2), the award against Joyce Schmitt and Diane Rankin was broken down into separate components – $17,500.00 against Joyce Schmitt and $7,500.00 against Diane Rankin.[11] The award was accepted by Defendant Ronald Schmitt, but rejected by the Plaintiffs and Defendants Joyce Schmitt and Diane Rankin.[12]

A jury trial, presided over by Judge Caprathe, was conducted over a period of 9 days in April of 2003. During the trial, Defendant's counsel asked the trial court to exclude

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[8] As the Court of Appeals has correctly noted, M Supply Company, a family business operated by Plaintiffs James and Kim Lindebaum, was originally named as a plaintiff in this action, but dismissed before trial.

[9] A copy of Plaintiffs' Complaint and Jury Demand is submitted herewith as Appendix "G."

[10] The Plaintiffs elected to have their claims treated as a single claim pursuant to MCR 2.403(H)(4).

[11] See case evaluators' award, submitted herewith as Appendix "H."

[12] See ADR Clerk's Notice to the Parties Re: Acceptance or Rejection of Case Evaluation, submitted herewith as Appendix "I."

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evidence of attorney fees paid by the Plaintiffs in regard to these matters because Plaintiffs' Complaint had not included any request for an award of attorney fees, and their witness list had not identified any witness able to provide testimony as to the reasonableness of the fees charged. (Trial Transcript, hereinafter "T.," Vol. III, pp. 161-164; Vol. IV, pp. 4-7) In response to this request, Plaintiffs' counsel made a motion for leave to file an Amended Complaint, seeking attorney fees as an element of damages pursuant to MCL 600.2911(7). (T. Vol. IV, pp. 8-10) This motion was granted over Defendants' objection, and an Amended Complaint was filed in accordance with the court's ruling on April 10, 2003, after the fifth day of trial (T., Vol. IV, pp. 10-15; Amended Complaint).[13]

Like the original Complaint, the Amended Complaint requested only a money judgment, with no request for any form of equitable relief. Like the original Complaint, the Amended Complaint demanded trial by jury.

To support his claim for attorney fees as an element of damages, Plaintiffs' trial counsel, David Skinner, subsequently provided his own testimony regarding the attorney fees incurred by the Plaintiffs for his services in this matter. (T., Vol. VI, pp. 65-93)[14] In his testimony given on April 9, 2003, Mr. Skinner identified a 13-page printout, admitted as Plaintiffs' Exhibit 28, which itemized attorney fees for services rendered to the Plaintiffs by himself and his firm for work done in relation to this matter from November 8, 2000 through April 7, 2003. That exhibit reflected billings for a total of 293 hours for services provided

[13] A copy of Plaintiffs' Amended Complaint is submitted herewith as Appendix "J."

[14] Prior to Mr. Skinner's testimony, Defendants' counsel objected, out of the presence of the jury, to Mr. Skinner being allowed to present testimony in this matter. This objection was based, in part, upon the fact that Mr. Skinner had never been listed as a witness. This objection was also overruled. (T. Vol. VI, pp. 57-60)

during that period, and indicated that a total of $53,942.60 had been billed for those services. A separate document, admitted as Plaintiffs' Exhibit 29, listed a total of $4,672.18 of billed costs. (T., Vol. VI, pp. 72-73) Mr. Skinner testified that these exhibits reflected the actual costs and attorney fees incurred by the Plaintiffs in this matter. (T., Vol. VI, p. 93)

In his closing argument, Plaintiffs' counsel addressed the issue of attorney fees and costs, and requested an award of the full amount identified in his testimony. (T. Vol. IX, pp. 68, 73) Defendants' counsel suggested, in his closing, that if attorney fees were to be awarded, they should be limited to the amount actually paid, and that the award be apportioned among the Plaintiffs in accordance with the amount of damages recovered by each. (T. Vol. IX, pp. 99-100) In its instructions to the jury, the trial court instructed, in accordance with M Civ JI 50.01, that the jury should determine the amount of money which would "reasonably, fairly, and adequately" compensate the Plaintiffs, and that the elements of damage should include costs and actual attorney fees, including any costs and attorney fees to be incurred in the future. (T. Vol. IX, pp. 125-126, 146)

At the conclusion of the trial, the jury awarded the Plaintiffs a total of $22,000.00. Of that amount, $11,000.00 was allocated to Defendant Diane Rankin, $9,000.00 to Defendant Joyce Schmitt, and $2,000.00 to Defendant Ronald Schmitt.[15] In each of the verdict forms, the jury was asked to specify the amounts awarded as attorney fees. Out of the total award, $10,000.00 was awarded for attorney fees – $5,000.00 to Plaintiff James Lindebaum, and $5,000.00 to Plaintiff Kim Lindebaum. The remainder was awarded for noneconomic

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[15] The jury's findings, the amounts awarded as damages, and the apportionment of the awarded damages between the Defendants, were specified in separate jury verdict forms completed with regard to each of the four Plaintiffs. Copies of those verdict forms are submitted herewith as Appendix "K."

damages – $5,000.00 to Plaintiff James Lindebaum, $5,000.00 to Plaintiff Kim Lindebaum, $1,000.00 to Plaintiff Kerry Kusmierz, and $1,000.00 to Plaintiff JoAnn Kusmierz. No exemplary damages were awarded. (Verdict forms – Appendix "K")

The total adjusted verdict for the Plaintiffs, including their costs and interest from the filing of their Complaint to case evaluation, was $23,315.54.[16] Thus, on the basis of the verdict rendered, the Plaintiffs did not improve their position. Defendant Joyce Schmitt improved her position at trial, but Defendant Diane Rankin did not. Accordingly, based upon the verdicts rendered by the jury, the Plaintiffs should not have been entitled to case evaluation sanctions, and case evaluation sanctions should have been awarded to Defendant Joyce Schmitt. *See:* MCR 2.403(O)(1).

After the verdict, Plaintiffs sought to avoid paying Defendant Schmitt's attorneys fees and to improve their position so that they could instead receive case evaluation sanctions. Two strategies were employed for these purposes. First, Plaintiffs filed a motion for new trial/additur, in which they maintained that *additur* should be awarded, or a new trial granted, because the amount of attorney fees awarded by the jury was far less than the amount requested.[17] Second, the Plaintiffs filed a motion for injunctive relief, requesting that the Defendants be permanently enjoined from engaging in a number of types of harassing conduct enumerated therein.[18]

[16] This was acknowledged by Plaintiffs on page 2 of their Brief in Support of Plaintiffs' Response to Defendant Joyce Schmitt's Motion for Case Evaluation Sanctions. The calculation establishing this amount as the adjusted verdict was set forth in Exhibit C of that document, a copy of which is submitted herewith as Appendix "L."

[17] *See*: Plaintiffs' Motion for Additur or Partial New Trial and Judgment Notwithstanding the Verdict, dated May 2, 2003.

[18] *See*: Plaintiffs' Motion for Permanent Injunction, dated May 5, 2003.

These motions were argued and taken under advisement, on June 5, 2003. In a written Opinion and Order subsequently issued on December 19, 2003,[19] the trial court denied Plaintiffs' motion for new trial/additur, noting that the amount awarded by the jury for attorney fees was within the range supported by the evidence presented at trial. (Appendix "M", pp. 3-7). The court granted Plaintiffs' motion for injunctive relief, however, despite the fact that no form of injunctive relief had been requested in either of their complaints. (Appendix "M" pp. 8-10)

A separate written Order for Injunctive Relief (Appendix "B") was subsequently entered, in accordance with the trial court's Opinion and Order of December 19, 2003, on February 9, 2004. Pursuant to that Order, the Defendants were enjoined, for a period of three years, from sending letters or packages to Plaintiffs' residences or places of employment, coming within ¼ mile of Plaintiffs' residences, and putting anything in Plaintiffs' mailboxes or driveways. As noted previously, a written final Judgment (Appendix "A") was entered, in accordance with the jury's verdict, on February 10, 2004. No appeals were taken from either of these orders.

Following the entry of the trial court's final Judgment, the Plaintiffs filed a motion for assessment of case evaluation sanctions.[20] In that motion, Plaintiffs argued that, although the adjusted verdict in their favor was less than the total case evaluation award, they had improved their position, and Defendant Joyce Schmitt had not, by virtue of the court's subsequent award of injunctive relief. In their motion and supporting brief, Plaintiffs

[19] A copy of the trial court's Opinion and Order of December 19, 2003 is submitted herewith as Appendix "M."

[20] *See*: Plaintiffs' Motion to Determine Case Evaluation Sanctions and supporting brief.

requested that the trial court award $86,298.30 (375.21 hours x $230.00 per hour) for attorney fees incurred since the case evaluation.[21]

The Defendants objected to Plaintiffs' request, and Defendant Joyce Schmitt filed her own motion for assessment of case evaluation sanctions.[22] Defendants argued that it would be inappropriate to consider the court's post-trial grant of injunctive relief as a basis for an award of case evaluation sanctions in this case because: 1) The order granting that relief was not a part of the "verdict" for purposes of determining liability for case evaluation sanctions; 2) No request for equitable relief was made in either of the Plaintiffs' Complaints, and no such request was considered by the case evaluators; and 3) The motion for injunctive relief was not filed until after the jury's verdict had made it plain that it was Defendant Joyce Schmitt, not the Plaintiffs, who should be entitled to case evaluation sanctions.

Defendants also argued that it would be inappropriate for the court to make an additional award of attorney fees as case evaluation sanctions because evidence supporting Plaintiffs' claims for attorney fees as an element of damages had been presented to the jury at trial over Defendants' objections, the jury had rendered its award of attorney fees based upon the evidence presented, and Plaintiffs' motion for *additur* relating to the claimed insufficiency of the attorney fees awarded had been denied.

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[21] A printout listing all of the attorney fees billed by Mr. Skinner and his firm for services rendered in this matter from November 8, 2000 through March 8, 2004 was presented as Exhibit E of Plaintiffs' Brief in Support of Case Evaluation Sanctions. A copy of that printout is submitted herewith as Appendix "N."

[22] *See*: Defendants Brief in Response to Plaintiffs Motion to Determine Case Evaluation Sanctions; Brief in Support of Motion for Case Evaluation Costs; Defendants' Memorandum of Law.

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The motions for case evaluation sanctions were argued before the trial court and taken under advisement on May 7, 2004, and the court's ruling was announced during further proceedings subsequently conducted on July 6, 2004. (Motion Hearing Transcript, 7-6-04. pp. 18-21) The trial court rejected Defendants' argument that its post-trial Order for Injunctive Relief could not be used as a basis for an award of case evaluation sanctions in this case, incorrectly noting that "I believe that the language in the complaint, which states that the plaintiff requests all other reliefs as necessary is sufficient for this court to consider the equitable relief received." (Motion Hearing Transcript, 7-6-04. p. 19)[23] Thus, based upon the adjusted verdict, enhanced by unspecified value attributed to its post-trial Order for Injunctive Relief, the trial court concluded that Plaintiffs' request for case evaluation sanctions should be granted, and Defendant Joyce Schmitt's request denied.

The trial court also rejected Defendants' claim that an additional award of attorney fees as case evaluation sanctions was inappropriate in light of the jury's consideration and award of attorney fees as an element of Plaintiffs' damages, but indicated that the amount awarded as case evaluation sanctions would be reduced by the amount previously awarded by the jury. (Motion Hearing Transcript, 7-6-04. p. 19-20)

Accordingly, by a written Order entered on August 31, 2004 (Appendix "C"), the trial court awarded Plaintiffs case evaluation sanctions in the amount of $67,259.60. By an Amended Order subsequently entered on September 8, 2004 (Appendix "D"), the court clarified that the award of case evaluation sanctions was against Defendants Diane Rankin

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[23] The Court should note that no such language appears in either of the Plaintiffs' Complaints. (Appendices "G" and "J") Indeed, the trial court had previously acknowledged, in its Opinion and Order of December 19, 2003. that "injunctive relief was not specifically requested in either Complaint." (Appendix "M" p. 9)

and Joyce Schmitt only, and denied Defendant Joyce Schmitt's motion for case evaluation sanctions.

As noted previously, Defendants Joyce Schmitt and Diane Rankin appealed the trial court's post-judgment Orders of August 31, 2004 and September 8, 2004 to the Court of Appeals as of right. The Defendants raised three claims of error in their appeal. In their first issue, they contended that the trial court had improperly relied upon its order granting Plaintiffs' post-trial motion for injunctive relief as a basis for its award of case evaluation sanctions. Specifically, they contended that: 1) MCR 2.403(O)(5) did not permit the trial court to consider its supplemental order for injunctive relief to determine Plaintiffs' entitlement to case evaluation sanctions in this case; 2) The trial court's post-trial order for injunctive relief was improperly considered a part of the "verdict" for purposes of determining liability for case evaluation sanctions under MCR 2.403(O)(1); 3) It was inappropriate for the trial court to consider its supplemental order for injunctive relief as a basis for an award of case evaluation sanctions because Plaintiffs had made no request for injunctive relief in their pleadings, and thus, the case evaluators had not considered any such request in determining their award; and 4) The trial court's reliance upon its post-trial order for injunctive relief as a necessary basis for its award of case evaluation sanctions was not "fair under all the circumstances," as required by MCR 2.403(O)(5)(b).

In their second claim of error, Defendants contended that the trial court's award of attorney fees as case evaluation sanctions had impermissibly infringed upon Defendants' constitutionally guaranteed right to trial by jury in this case, where evidence supporting plaintiffs' claim for attorney fees as an element of damages had been presented to the jury at trial, the jury had rendered its award of attorney fees based upon the evidence and proper

instructions, and the trial court had denied plaintiffs' motion for *additur* relating to the claimed insufficiency of the attorney fees awarded by the jury. In their third claim of error, Defendants contended that the trial court had erred in denying Defendant Joyce Schmitt's motion for case evaluation sanctions because Ms. Schmitt had improved her position at trial, while the Plaintiffs did not.

On November 15, 2005, the Court of Appeals reversed the trial court's orders and remanded the case to the trial court for further proceedings in an Opinion designated for publication. (Appendix "E") In its Opinion, the Court of Appeals agreed that Defendants were "technically correct in arguing that MCR 2.403(O)(5) does not, by its terms, contemplate the situation presented here," but concluded that "the trial court did not err in using MCR 2.403(O)(5) as a guide for this case, even though, by its terms, it does not technically apply." (Appendix "E" p. 6) The Court also rejected Defendants' argument that the trial court's supplemental order for injunctive relief did not constitute a part of the "verdict" for purposes of determining liability for case evaluation sanctions. (Appendix "E" p. 6)

Nonetheless, the Court of Appeals concluded that it was not fair "under all the circumstances" for the trial court to consider its supplemental award of injunctive relief as a basis for its award of case evaluation sanctions because: 1) The Plaintiffs' claim for injunctive relief was not considered by the case evaluators, and 2) The jury had awarded attorney fees as an element of damages, and its award had been upheld against Plaintiffs' motion for *additur*:

> "Defendants next argue that consideration of the value of equitable relief to award sanctions in this case is not "fair . . . under all of the circumstances." MCR 2.403(O)(5)(b). We agree, for a couple of reasons.
>
> "First, MCR 2.403(K)(3) allows case evaluators to consider claims for equitable relief ("The evaluation may not include a separate award on any claim for equitable relief, but the panel may consider such claims in

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determining the amount of an award."). Thus, evaluators presented with a case in which the plaintiffs seek "equitable relief" may place a value on that relief and augment the overall evaluation award accordingly. That approach makes legitimate a later comparison between the evaluation and a verdict that also includes a value for equitable relief. Defendants maintain that the case evaluation panel did not consider plaintiffs' request for injunctive relief when it issued its decision, and that certainly appears to be the case. Plaintiffs' complaint and amended complaint did not mention any request for injunctive relief, and the trial court was simply mistaken in suggesting that these pleadings were sufficiently vaguely or broadly worded to constitute such a request. Because the value of injunctive relief was not considered by the evaluators, the case evaluation in favor of plaintiffs may well have come in artificially low and, as a result, the difference between it and the verdict (which did include the value of injunctive relief) was greater than it should have been.

"Further, as summarized above, the jury heard evidence and arguments regarding plaintiffs' claims for attorney fees under MCL 600.2911(7) and rendered an award of attorney fees after being properly instructed. The jury's decision in this regard was reviewed and found appropriate by the trial judge in denying plaintiffs' motion for additur. In light of that, it was not "fair . . . under . . . the circumstances" of this case for the trial court to later award additional attorney fees as actual costs under MCR 2.403(O)(5). Under the circumstances of this case, we conclude that the trial court erred by taking into account the value of the equitable relief it had ordered in awarding costs against defendants under MCR 2.403(O)(5).

(Appendix "E" p. 7)

The Court of Appeals did not address Defendants' argument that the trial court's additional award of attorney fees as case evaluation sanctions impermissibly infringed upon their constitutionally guaranteed right to trial by jury. And, despite its finding that it was not fair "under all the circumstances" for the trial court to award case evaluation sanctions based upon its supplemental order for injunctive relief in light of the jury's prior award of attorney fees as an element of damages, the Court of Appeals ultimately concluded that it was, nevertheless, appropriate to award case evaluation sanctions in favor of Plaintiffs James and Kim Lindebaum. The Court determined, however, that the trial court had improperly failed to base its award upon a comparison of the amounts of the evaluation and verdict as to particular

pairs of parties. Thus, applying its own methodology for calculating a proportional apportionment of the individual evaluations and adjusted verdict among the parties, the Court determined that Defendants Schmitt and Rankin were liable for payment of case evaluation sanctions to Plaintiffs James and Kim Lindebaum, while Plaintiffs Joann and Kerry Kusmierz were liable for payment of case evaluation sanctions to Defendants Schmitt and Rankin. (Appendix "E" pp. 7-10)

Having made these determinations, the Court of Appeals ordered that the case be remanded to the trial court for further consideration and entry of new orders consistent with its Opinion. (Appendix "E" p. 10)

On December 6, 2005, Defendants Schmitt and Rankin filed a timely Motion for Reconsideration of the November 15, 2005 decision of the Court of Appeals. In that motion, Defendants reminded the Court that it had neglected to address their claim that the trial court's supplemental award of attorney fees as case evaluation sanctions had impermissibly infringed upon their constitutional right to jury trial, and asked that the Court grant reconsideration to consider and rule upon that issue. Defendants' Motion for Reconsideration also challenged the Court's methodology for apportionment of the awards and adjusted verdict between the individual pairs of parties. Defendants noted, in this regard, that the Court's methodology was inconsistent with the language of the pertinent court rules, unsupported by reported authority, and fundamentally unfair to the Defendants, who were never afforded an opportunity to accept or reject separate awards for individual Plaintiffs.

On January 13, 2006, the Court of Appeals entered its Order denying Defendants' Motion for Reconsideration. (Appendix "F")

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Defendants Schmitt and Rankin now seek leave to appeal the aforementioned decisions of the trial court and the Court of Appeals to this Honorable Court, or other appropriate peremptory relief in lieu of granting leave to appeal, pursuant to MCR 7.302.

LEGAL ARGUMENT

I. IT WAS INAPPROPRIATE FOR THE TRIAL COURT TO MAKE AN ADDITIONAL AWARD OF ATTORNEY FEES AS CASE EVALUATION SANCTIONS IN THIS CASE, WHERE EVIDENCE SUPPORTING PLAINTIFFS' CLAIM FOR ATTORNEY FEES AS AN ELEMENT OF DAMAGES HAD BEEN PRESENTED TO THE JURY AT TRIAL, THE JURY HAD RENDERED ITS AWARD OF ATTORNEY FEES BASED UPON THE EVIDENCE AND PROPER INSTRUCTIONS, AND THE TRIAL COURT HAD DENIED PLAINTIFFS' MOTION FOR ADDITUR RELATING TO THE CLAIMED INSUFFICIENCY OF THE ATTORNEY FEES AWARDED BY THE JURY.

With all due respect to the lower courts, the Defendants contend that it was clearly inappropriate for the trial court to make an additional award of attorney fees as case evaluation sanctions in this case, where the issue of Plaintiffs' attorney fees had been previously submitted to, and decided by, the jury. The Defendants had a constitutional right to have the amount of the requested damages determined by the jury. Having chosen to submit their claim for attorney fees to the jury as an element of their alleged damages, the Plaintiffs must abide by the jury's decision. Their disappointment with the jury's decision cannot justify the infringement of Defendants' constitutional right to jury trial.

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A. THE STANDARDS OF REVIEW

A trial court's decision regarding whether to grant case evaluation sanctions presents a question of law, which is reviewed *de novo*. Cusumano v Velger, 264 Mich App 234; 690 NW2d 309 (2004); Campbell v Sullins, 257 Mich App 179, 197; 667 NW2d 887 (2003); Great Lakes Gas Transmission Limited Partnership v Markel, 226 Mich App 127, 129; 573 NW2d 61 (1997).

It is well settled that questions of law are reviewed *de novo*. Halloran v Bhan, 470 Mich 572; 683 NW2d 129 (2004); Bartlett v North Ottawa Community Hospital, 244 Mich App 685; 625 NW2d 470 (2001) *lv den*, 465 Mich 907 (2001) The interpretation and application of court rules is a question of law, reviewed by this Court *de novo*. Haliw v City of Sterling Heights, 471 Mich 700, 704; 691 NW 2d 753 (2005); Campbell v Sullins, *supra*, 257 Mich App at 198.

All of the issues raised in this Application for Leave to Appeal present questions of law. Those issues must therefore be reviewed *de novo*.

B. THE DEFENDANTS' CONSTITUTIONAL RIGHT TO JURY TRIAL HAS BEEN IMPROPERLY INFRINGED BY THE TRIAL COURT'S AWARD OF ATTORNEY FEES PREVIOUSLY DENIED BY THE JURY'S VERDICT.

In Michigan, the right to jury trial in civil cases is guaranteed by Const 1963, art 1, § 14, which provides, in pertinent part, that: "The right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law."

When the constitutionally guaranteed right of jury trial has been demanded, a party is entitled to have claims for money damages determined by the jury unless the constitutional

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right to jury trial has been properly waived by all parties. Prentis Family Foundation v Barbara Ann Karmanos Cancer Institute, 266 Mich App 39, 54; 698 NW2d 900 (2005), *lv den*, 474 Mich 871 (2005); Mink v Masters, 204 Mich App 242, 246-247; 514 NW2d 235 (1994); MCR 2.508(D)(3) Thus, when the right to jury trial has been demanded by the plaintiff, the defendant may rely upon that demand, and need not file a separate jury demand of his own. Prentis Family Foundation, *supra*; Mink v Masters, *supra,* at 246-247.

As noted previously, the right to jury trial was demanded in both of the Plaintiffs' Complaints (Appendices "G" and "J"). Thus, in accordance with the aforementioned authorities, the Defendants had a constitutionally guaranteed right to have damages determined by the jury. It has become well settled in Michigan that the constitutional right to jury trial includes the right to have the jury assess damages. *See:* Zaiter v Riverfront Complex, Ltd., 463 Mich 544; 620 NW 2d 646 (2001); Wood v DAIIE, 413 Mich 573, 582-584; 321 NW 2d 653 (1982); Leary v Fisher, 248 Mich 574, 578; 227 NW 767 (1929); Phillips v Mirac, Inc., 251 Mich App 586, 591; 651 NW 2d 437 (2002), *aff'd* 470 Mich 415; 685 NW 2d 174 (2004); Wiley v Henry Ford Cottage Hospital, 257 Mich App 488, 507; 668 NW 2d 402 (2003), *lv den*, 469 Mich 1019 (2004); Mink v Masters, *supra*, 204 Mich App at 246-247.

Although Plaintiffs' original Complaint did not seek attorney fees as an element of damages, Plaintiffs were allowed to amend their Complaint during the trial to allow the presentation of this claim to the jury. Consequently, the issue of attorneys fees was presented to the jury, and based upon the evidence presented, the jury found that Plaintiffs' fair and reasonable attorneys fees were $10,000.00, not the $53,942.60 requested by Plaintiffs' counsel. As noted previously, the trial court had instructed the jurors, in accordance with M

Civ JI 50.01, that they should determine the amount of money which would "reasonably, fairly, and adequately" compensate the Plaintiffs, and that the elements of damage should include costs and actual attorney fees, **including any costs and attorney fees to be incurred in the future**. (T. Vol. IX, pp. 125-126, 146)

Plaintiffs were not satisfied with the jury's verdict of $10,000 for attorneys fees, and therefore filed a motion for additur/new trial, requesting that the trial court grant them a new trial unless the Defendants agreed to an increased judgment of attorneys fees. The trial court denied this motion, finding that *additur* was not warranted, and Plaintiffs took no appeal from that decision.

It may be acknowledged that a trial court may set aside a jury's decision in certain very limited circumstances. When it is claimed that a jury's award of damages was grossly inadequate, the court may grant a new trial if the defendant will not agree to *additur*. MCR 2.611(E) provides that:

> "(1) If the court finds that the only error in the trial is the inadequacy or excessiveness of the verdict, it may deny a motion for new trial on condition that within 14 days the nonmoving party consent in writing to the entry of judgment in an amount found by the court to be the lowest (if the verdict was inadequate) or highest (if the verdict was excessive) amount the evidence will support.
>
> (2) If the moving party appeals, the agreement in no way prejudices the nonmoving party's argument on appeal that the original verdict was correct. If the nonmoving party prevails, the original verdict may be reinstated by the appellate court."

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The language of this court rule regarding *remittitur* and *additur* was carefully crafted so as not to impinge the parties' constitutional right to a jury trial. The rule does not allow the trial court to increase or decrease a jury award at will. The trial court can only deny a motion for a new trial conditioned upon the opposing party's acceptance of an increased award, and it

can only make this proposal if it first determines that the jury's award is "grossly inadequate." The court cannot *carte blanche* adjust jury awards for any reason whatsoever without limitation, because to do so would violate the parties' constitutionally guaranteed right to jury trial.

A trial court's authority to grant case evaluation sanctions is also limited by the parties' constitutional right to a jury trial in a case such as this, where the issue of attorney fees has been made an element of damages submitted to the jury. Although the authority to award case evaluation sanctions is provided under the Michigan Court Rules and by statute,[24] that authority – granted by Supreme Court rule and the Legislature – is subject to the constitutionally guaranteed right of jury trial. The constitutional right to jury trial reigns supreme, and cannot be abridged by legislation or rules promulgated pursuant to this Court's rule-making authority. This Court has often recognized that rights guaranteed by our Constitution, including the right to jury trial, cannot be denied or impaired by legislative enactments or court rules.[25] *See:* Conservation Department v Brown, 335 Mich 343, 346; 55 NW 2d 859 (1952) (The constitutional right to jury trial may not be defeated by a statutory enactment.); Jones v Eastern Michigan Motorbuses, 287 Mich 619, 630; 283 NW 710 (1939)(the Court's authority to enact rules of practice is subject to constitutional limitations, and thus, the Court cannot make or enforce rules which contravene a constitutional provision);

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[24] *See:* MCL 600.4951 *et seq.*

[25] This should come as no surprise. Clearly, the Legislature and this Court cannot enact legislation or promulgate court rules which would abridge constitutionally guaranteed rights such as the rights to free exercise of religion, due process, equal protection of the law, and freedom from unreasonable search and seizure, compelled self-incrimination, and cruel and/or unusual punishment. Clearly, the same applies with regard to legislation or court rules abridging the constitutionally guaranteed right to jury trial.

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Risser v Hoyt, 53 Mich 185, 196; 18 NW 611 (1884), quoting Plimpton v Town of Somerset, 33 Vt 288 (1860) ("any act which destroys or materially impairs the right of trial by jury according to the course of the common law, in cases proper for the cognizance of a jury, is unconstitutional.")

Thus, in a case such as this, where a party's constitutional right to have damages determined by the jury would be eroded, and indeed, rendered entirely meaningless, by a post-judgment award of additional attorney fees for the same services as case evaluation sanctions, the authority that the court would otherwise have to make such an award must yield to the party's constitutional right to jury trial.

Here, because the Plaintiffs were dissatisfied with the jury's award of attorney's fees, they properly raised their objection by means of a motion for new trial/additur. However, recognizing that the jury award was supported by competent evidence and was not "grossly inadequate," the trial court denied Plaintiffs' motion. Plaintiffs could have pursued the matter further by seeking appellate review of that decision, but they did not choose to do so. Instead, by requesting the same attorney fees as case evaluation sanctions that were previously denied by the jury, the Plaintiffs asked the trial court to do what it could not do with regard to Plaintiffs' motion for new trial/additur – increase the jury's fair and reasonable verdict.

Since Plaintiffs voluntarily submitted the issue of attorneys fees to the jury as an element of their damages alleged in this matter, the entire issue of attorneys fees should have been taken off the table, and Plaintiffs should have been required live with the jury's fair and reasonable verdict. To allow them to circumvent the *additur* rule by obtaining the rest of their attorney's fees by means of a motion for case evaluation sanctions was a clear infringement of Defendants' constitutional right to jury trial.

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Apart from the constitutional concerns, the Defendants submit that it is also fundamentally unfair to bootstrap an award of additional attorney fees as case evaluation sanctions based upon a jury's lesser award of attorney fees for the same legal services in cases such as this, where the plaintiff has elected to seek an award of attorney fees from the jury as an element of his damages. Thus, at the very least, the Court should disallow any further award of attorney fees as case evaluation sanctions in such cases if the other elements of damages awarded by the jury are insufficient to support the award without consideration of the amount awarded for attorney fees. The amount awarded for attorney fees may be easily identified by requiring the jurors to designate a specific amount of damages to be awarded for attorney fees, as the jurors did in this case.[26] In this case, $10,000.00 of the $22,000.00 awarded as damages was specifically designated as an award of damages for attorney fees. (Appendix "K")

Without consideration of the $10,000.00 awarded for attorney fees, the remainder of the damages awarded by the jury could not have supported an award of case evaluation sanctions against either of these Defendants. Thus, it is clear that the jury's reasonable award of attorney fees has been unfairly used as the essential basis for bootstrapping an additional award of attorney fees for the same services that the jury did not see fit to award. The Defendants contend that this was a clear violation of their constitutional right to jury trial for all of the reasons previously discussed. And, apart from the constitutional violation, this action was fundamentally and shockingly unfair under the circumstances of this case.

Plaintiffs have not responded to Defendants' argument that the trial court's supplemental award of attorney fees as case evaluation sanctions improperly infringed their

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[26] See Verdict Forms, submitted herewith as Appendix "K."

constitutional right to jury trial in this case. They have merely stated that a non-duplicative award of attorney fees as case evaluation sanctions is permissible, citing this Court's decisions in McAuley v General Motors Corporation, 457 Mich 513, 524-525; 578 NW2d 282 (1998) and Rafferty v Markovitz, 461 Mich 265; 602 NW2d 367 (1999). Plaintiffs' reliance upon these cases is misplaced, however, because the constitutional question presented here was not raised, discussed, or ruled upon, in either case. Indeed, the Court's decision in Rafferty reveals that the statutory award of attorney fees in that case was made by the trial court, and thus, the right to jury trial was not implicated, as it is in this case. 461 Mich at 265-266

The statutory award of attorney fees at issue in Rafferty was made under the Elliot-Larsen Civil Rights Act, MCL 37.2101, *et seq.* The statutory award of attorney fees at issue in McAuley was made under the Handicapper's Civil Rights Act. The Court's decision in McAuley does not explain why the constitutional question was not addressed. It is very possible, however, that infringement of the constitutional right to jury trial was not raised in McAuley because the newly created cause of action under the Handicapper's Civil Rights Act (1976 PA 220) was not known to the common law before the adoption of the 1963 Constitution, and thus, the constitutional right to jury trial was thought to be inapplicable.

Michigan's reported appellate decisions have frequently held that the purpose of Const 1963, art 1, § 14 and its predecessors has been to preserve the right of jury trial in all cases where it existed before the constitution was adopted. *See*: Friedman v Dozorc, 412 Mich 1, 60, fn. 6; 312 NW2d 585 (1981) (Levin, J. concurring); Conservation Department v Brown, 335 Mich 343, 346; 55 NW2d 859 (1952); Tabor v Cook, 15 Mich 322 (1867); In Swart v Kimball, 43 Mich 443, 448; 5 NW 457 (1880), Justice Cooley wrote that:

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> "The Constitution of the State provides that "the right of trial by jury shall remain, but shall be deemed to be waived in all civil cases, unless demanded by one of the parties in such manner as shall be prescribed by law." Article vi. §27. The right is to *remain*. What right? Plainly the right as it existed before; the right to a trial by jury as it had become known to the previous jurisprudence of the State."
>
> (Underlined emphasis added.)

Consistent with this basic purpose, Justice Cooley also emphasized, in The State Tax Law Cases, 54 Mich 350; 20 NW 493 (1884), that the constitutionally mandated preservation of the right to jury trial does not require that the right be extended to new causes of action which were unknown to the common law, and if a jury trial is not provided in such cases, the right is not cut off, but is simply not given:

> "This case is a proceeding in equity instituted by the state to enforce against a parcel of land a lien which it claims for taxes; and it is a different proceeding altogether from any which was known to our jurisprudence in 1850. It is a new proceeding, and therefore if jury trial cannot be had in it, that method of trial is not *cut off*, but is simply *not given*. There is nothing in the Constitution which renders it necessary to provide for jury trial in new cases. The constitutional provision is "The right of trial by jury shall *remain*;" by which we are to understand merely that it is retained for the cases in which it existed before."
>
> 54 Mich at 363 (underlined emphasis added)

Thus, it may be seen that the question presented here is simply not answered at all by McAuley or Rafferty. The causes of action litigated in this case were well known to the common law long before the adoption of the 1963 Constitution. Thus, the Defendants were constitutionally entitled to have the damages for those causes of action determined by the jury. Plaintiffs chose to seek attorney fees, including fees to be incurred in the future, as an element of their damages, to be determined by the jury. Having made that choice, and having failed to seek appellate review of the trial court's denial of their motion for *additur*, the Plaintiffs must be bound by the jury's decision.

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The Court of Appeals has also disregarded this important constitutional question. In the Court's Opinion of November 15, 2005 (Appendix "E"), this important issue was addressed only in relation to the claim, raised in Defendants' first issue, that it was not "fair to award costs under all the circumstances" under MCR 2.403(O)(5), and thus, it was inappropriate for the trial court to base its award of case evaluation sanctions upon its post-trial Order awarding injunctive relief. On page 7 of its Opinion (Appendix "E"), the Court addressed the issue as follows:

> "Further, as summarized above, the jury heard evidence and arguments regarding plaintiffs' claims for attorney fees under MCL 600.2911(7) and rendered an award of attorney fees after being properly instructed. The jury's decision in this regard was reviewed and found appropriate by the trial judge upon plaintiffs' motion for additur. **In light of that, it was not "fair . . . under . . . the circumstances" of this case for the trial court to later award additional attorney fees as actual costs under MCR 2.403(O)(5).** We conclude, under the circumstances of this case, that the trial court erred by taking into account the value of the equitable relief it ordered in awarding costs against defendants under MCR 2.403(O)(5)."
>
> (Appendix "A" p. 7 – Emphasis added)

Having properly concluded that it was not "fair under the circumstances" for the trial court "to later award additional attorney fees as case evaluation sanctions under MCR 2.403(O)(5)" in light of the jury's consideration of Plaintiffs' claim for attorney fees, the jury's award of such fees under proper instructions, and the trial court's rejection of Plaintiffs' subsequent request for *additur*, the Court went on, in the remainder of its Opinion, to hold that Defendants may be held liable for payment of case evaluation sanctions to Plaintiffs James and Kim Lindebaum.

This inconsistency suggests an erroneous belief that Defendants' constitutional objection was raised only in relation to their claim that the trial court's post-judgment award of case evaluation sanctions, based upon its post-trial injunctive order, was not fair "under all

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the circumstances," and was therefore inappropriate under MCR 2.403(O)(5). If this was, indeed, the Court's assumption, it was mistaken for two reasons.

First, Defendants' constitutional claim was separately presented in their second issue, where they specifically argued that it was constitutionally inappropriate, under Const 1963, art 1, § 14, for the trial court to make an additional award of attorney fees as case evaluation sanctions in this case, where Plaintiffs' counsel had chosen to make attorney fees an issue for the jury, and the jury had rendered its decision. Defendants maintained that, because the jury had spoken and its decision was not appealed, it was constitutionally impermissible for the trial court to make **any** additional award of attorney fees as case evaluation sanctions under **any** circumstances. The existence of the constitutional violation clearly did not depend upon whether or not the subsequent award was based upon a post-trial award of injunctive relief.[27]

The nature of the issue was precisely summarized in the Appellants' Brief as follows:

> "Since Plaintiffs voluntarily submitted the issue of attorneys fees to the jury, the entire issue of attorneys fees should be taken off the table, and Plaintiffs should be required live with the jury's fair and reasonable verdict. To allow them to circumvent the additur rule by obtaining the rest of their attorneys fees by means of a motion for case evaluation sanctions was a clear infringement of Defendants' constitutional right to jury trial."
>
> (Appellant's Brief, p. 24)

Second, if it was not "fair under the circumstances" for the trial court to later award additional attorney fees as case evaluation sanctions in light of the jury's prior award of attorney fees, as the Court of Appeals correctly held on page 7 of its Opinion, it was wholly inconsistent and illogical for the Court to then conclude that such an award should be made on remand to the trial court.

[27] Indeed, the trial court's award of injunctive relief had no relevance to the constitutional question at all, because such relief can only be awarded by the court.

All of this was duly noted in the Defendants' timely-filed Motion for Reconsideration. That motion was denied without comment on January 13, 2006, and thus, the Defendants' constitutional claim remains unaddressed. Accordingly, the Defendants must now call upon this Court to consider and properly resolve this important question.

II. THE COURT OF APPEALS ERRONEOUSLY CONCLUDED THAT PLAINTIFFS JAMES AND KIM LINDEBAUM WERE ENTITLED TO AN AWARD OF CASE EVALUATION SANCTIONS IN THIS CASE, WHERE THE ADJUSTED VERDICT WAS LESS THAN THE LUMP-SUM AWARD ELECTED BY THE PLAINTIFFS PURSUANT TO MCR 2.403(H)(4).

At the conclusion of the lengthy jury trial conducted in this case, the jury awarded the Plaintiffs less than the lump-sum previously awarded by the case evaluators pursuant to MCR 2.403(H)(4). Indeed, the total of the amounts awarded to all of the Plaintiffs, adjusted as required by MCR 2.403(O)(3), was still considerably less than the total lump-sum awarded by the case evaluators.[28] Nonetheless, the trial court ordered Defendants Schmitt and Rankin to pay the Plaintiffs $67,259.60 in case evaluation sanctions, based upon its consideration of additional unspecified value attributed to its post-trial Order for Injunctive Relief (Appendix

[28] As noted previously, the Plaintiffs elected to be treated as a single party with a single claim pursuant to MCR 2.403(H)(4), and the lump-sum case evaluation award to the Plaintiffs was $25,000.00. Under MCR 2.403(O)(3), a verdict is considered more favorable to the plaintiff if the adjusted verdict is more than 10 percent above the amount of the evaluation. Thus, to be considered more favorable to the Plaintiffs in this case, the adjusted jury verdict would have to be $27,500.00 or more. As noted previously, the adjusted verdict was only $23,315.54. (Appendix "L")

"B").[29] Although the Court of Appeals agreed that it was inappropriate for the trial court to base its award of case evaluation sanctions upon its separate Order for Injunctive Relief, it concluded that an award in favor of Plaintiffs James and Kim Lindebaum was appropriate, based upon its own newly-devised methodology for apportionment of the lump-sum award and the individual verdicts.

For the reasons discussed in greater detail *infra*, Defendants contend that the trial court's decision should have been reversed in its entirety. Under the circumstances presented here, none of the Plaintiffs were entitled to an award of case evaluation sanctions.

A. THE STANDARDS OF REVIEW

This issue involves interpretation of the case evaluation court rules. As noted previously, these are questions of law, reviewed by this Court *de novo*.

B. THE COURT OF APPEALS HAS IMPROPERLY DEVISED A METHODOLOGY FOR APPORTIONMENT OF THE LUMP-SUM CASE EVALUATION AWARD WHICH IS INCONSISTENT WITH THE LANGUAGE OF THE PERTINENT COURT RULES, UNSUPPORTED BY REPORTED AUTHORITY, AND FUNDAMENTALLY UNFAIR TO THE DEFENDANTS, WHO WERE NEVER AFFORDED AN OPPORUNITY TO ACCEPT OR REJECT SEPARATE AWARDS FOR THE INDIVIDUAL PLAINTIFFS.

Under MCR 2.403(O)(1), a party who has rejected a case evaluation award must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party

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[29] The trial court based its award of case evaluation sanctions upon the additional unspecified value attributable to its post-trial Order for Injunctive Relief because it properly recognized that the adjusted verdict was insufficient to satisfy the threshold established under the second sentence of MCR 2.403(O)(1). (Motion Hearing Transcript, 7-6-04. p. 19)

than the case evaluation. An additional requirement applies, however, where both parties have rejected. In that case, a party who has rejected the award may still be awarded case evaluation sanctions against the opposing party if the opposing party is liable for payment of sanctions, *i.e.*, the verdict was **not** more favorable to the opposing party than the case evaluation award, **and** the verdict **was** more favorable to the party requesting sanctions than the case evaluation award:

> "If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation."

On its own motion, and without benefit of briefing by the parties, the Court of Appeals raised the question of whether a lump-sum case evaluation award rendered under MCR 2.403(H)(4) must be apportioned between multiple plaintiffs to determine liability for payment of case evaluation sanctions under MCR 2.403(O)(1) in cases such as this, where the plaintiffs and defendants have both rejected the award. Having considered the issue in this fashion, the Court concluded that the lump-sum award must be apportioned equally between all of the Plaintiffs in this case, and that the apportioned awards must then be used to determine whether each individual Plaintiff has improved his or her position under MCR 2.403(O)(1), as to each individual Defendant. Again, with all due respect to the Court of Appeals, the Defendants contend that this conclusion was erroneous for a number of reasons.

First, the Court of Appeals has cited no case authority for its construction of MCR 2.403(O)(4)(a), and this writer has found no authority supporting that construction.

Second, the Court's interpretation of MCR 2.403(O)(4)(a) conflicts with the clear language of subrules (H)(4) and (O)(1), and impermissibly renders the lump-sum award

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option meaningless under the circumstances appearing in this case. MCR 2.403(H)(4) affords multiple plaintiffs an opportunity to elect a single lump-sum award in cases such as this, where the case involves claims of multiple injuries to members of a single family.[30] If multiple plaintiffs elect a lump-sum award, they pay only a single case evaluation fee. If they desire separate awards, they must each pay separate a separate case evaluation fee. If multiple plaintiffs elect a single lump-sum award under MCR 2.403(H)(4), the defendants must accept or reject that award *in toto*:

> "(4) In the case of multiple injuries to members of a single family, the plaintiffs may elect to treat the action as involving one claim, with the payment of one fee and the rendering of one lump sum award to be accepted or rejected. If no such election is made, a separate fee must be paid for each plaintiff, and the case evaluation panel will then make separate awards for each claim, which may be individually accepted or rejected."

The Court should note, in this regard, that defendants are not permitted the option of choosing a lump-sum award against all defendants. MCR 2.403(K)(2) requires that the evaluation "must include a separate award as to the plaintiff's claim against each defendant and as to each cross-claim, counterclaim, or third-party claim that has been filed in the action." The breakdown of the lump-sum award into separate awards against Defendants

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[30] The Court of Appeals has noted that Plaintiffs' claims were treated as one claim by stipulation of the parties and questioned whether it was appropriate to do so under the circumstances of this case. (Appendix "E" p. 2, fn. 1) Defendants contend that the result in this case should not depend upon whether Plaintiffs were entitled to a lump-sum award under MCR 2.403(H)(4), or obtained that award by stipulation. The end result would have been the same either way. Plaintiffs were not required to pay the multiple case evaluation fees that they would have been required to pay to obtain separate awards, and the case evaluators rendered a single lump-sum award in favor of all of the Plaintiffs, which the Defendants were required to accept or reject *in toto*. Moreover, the Court should bear in mind that MCR 2.403(H)(4) gives the option of choosing a lump-sum award to the Plaintiffs alone, in cases where the option applies. Thus, the methodology adopted in the Court of Appeal's published decision will be binding upon defendants in future cases, whether they have agreed to a lump-sum award or not.

Schmitt and Rankin was evidently made in accordance with this requirement. That breakdown was necessary to allow for the subsequent determination of whether the verdict was, or was not, more favorable to each of them than the case evaluation. It is reasonable to assume that the requirement of separate awards against individual defendants was included in subrule (K)(2) for that reason.

The Court of Appeals' conclusion that MCR 2.403(O)(4)(a) requires an apportionment of the lump-sum award made under MCR 2.403(H)(4) overlooks the fact that, by its plain terms, subrule (H)(4) treats the claims of multiple plaintiffs as a single claim.[31] Because that subrule plainly requires a single award for multiple claims that are treated as a single claim, it stands to reason that the multiple plaintiffs who elect a lump-sum award should be treated as a single "party" for purposes of subrule (O)(4)(a) and the second sentence of subrule (O)(1).[32] Similarly, a single lump-sum award made in favor of plaintiffs who elect it should be considered "the case evaluation" for purposes of the second sentence of subrule (O)(1).

If subrules (O)(1) and (O)(4)(a) are interpreted and applied in this manner, a sensible and harmonious result is achieved. When a lump-sum award is elected under subrule (H)(4),

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[31] It has become well settled that, when called upon to construe a court rule, this Court applies the legal principles governing the construction and application of statutes. Thus, the Court begins with the plain language of the rule in question. When the language is unambiguous, the Court enforces the meaning expressed, without further judicial construction or interpretation. Haliw v City of Sterling Heights, *supra*, 471 Mich at 704-705; Grievance Administrator v Underwood, 462 Mich 188, 193-194; 612 NW 2d 116 (2000)

[32] Plaintiffs have acknowledged, in their separate Application for Leave to Appeal (Supreme Court Docket No. 130187), that they elected to be treated as a single party pursuant to MCR 2.403(H)(4) for purposes of the case evaluation conducted in this case. On page 23 of their application, Plaintiffs have stated that "MCR 2.403(H)(4) allows members of a single family to elect to treat the action as one claim with payment of one fee and the rendering of one lump-sum award to be accepted or rejected. **The parties in this case stipulated that the Plaintiffs would be treated as a single party – this is not in dispute.**" (Plaintiff's Application, p. 23 – Emphasis added)

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the plaintiffs (as a group) and the defendants must both accept or reject that single award. If the plaintiffs accept, they cannot be subject to an award of case evaluation sanctions. If the plaintiffs and the defendants both reject, the plaintiffs' entitlement to case evaluation sanctions will depend upon: 1) Whether the verdict against each defendant is more favorable to that defendant than the specific award rendered against each individual defendant pursuant to subrule (K)(2); **and** 2) Whether the total adjusted verdict is more favorable to the plaintiffs than "the case evaluation," *i.e.*, the lump-sum award made pursuant to subrule (H)(4), as required by the second sentence of subrule (O)(1).

The interpretation of MCR 2.403(O)(4)(a) adopted by the Court of Appeals in this case renders the election of a lump-sum award under MCR 2.403(H)(4) meaningless, to defendants at least, because the plaintiffs would be given the benefit of equally apportioned awards in favor of each plaintiff – ***awards that the case evaluators never made*** – without being required to pay for, or accept or reject, such individual awards.

Finally, the Court of Appeals' interpretation of MCR 2.403(O)(4)(a) is fundamentally unfair to the Defendants because **application of the Court's methodology holds them responsible for a rejection that they did not make.** As noted previously, the defendants must accept or reject the award *in toto* when a single lump-sum award is elected by the plaintiffs under subrule (H)(4). They are not given an opportunity to accept or reject individual awards in favor of each individual plaintiff, and thus, the Defendants in this case did not have an opportunity to accept or reject the neatly apportioned individual awards fashioned according to Court of Appeals' newly–announced methodology. Had they been afforded that opportunity, it is entirely possible that they might have accepted the awards made in favor of some of the Plaintiffs while rejecting the awards made in favor of others,

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based upon the relative strengths and weaknesses of each Plaintiff's individual claims. It is entirely possible, for example, that the Defendants might have accepted the individual awards made in favor of James and Kim Lindebaum while rejecting the individual awards in favor of Joann and Kerry Kusmierz and M. Supply Co. In that event, the Defendants would not have been liable for case evaluation sanctions at all.

The Defendants respectfully submit that it is fundamentally unfair, and indeed, a clear denial of their right to due process of law, for a court to hold them responsible in this manner for rejection of apportioned awards that they did not make, and indeed, were never given the opportunity to accept or reject. Under the circumstances appearing here, the Plaintiffs must be considered a single party, and the single lump-sum award that **they** have elected must be deemed "the case evaluation" for purposes of determining their entitlement to case evaluation sanctions under the second sentence of MCR 2.403(O)(1). The total adjusted verdict in this case was not more favorable to the Plaintiffs than that award; indeed it was considerably less. This being the case, the requirement established under the second sentence of subrule (O)(1) was not satisfied, and accordingly, none of the Plaintiffs were entitled to an award of case evaluation sanctions in this matter.

III. THE TRIAL COURT IMPROPERLY CONSIDERED ITS POST-TRIAL AWARD OF INJUNCTIVE RELIEF AS A BASIS FOR AN AWARD OF CASE EVALUATION SANCTIONS IN THIS CASE.

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Although the trial court properly recognized that Plaintiffs could not be awarded case evaluation sanctions based upon the jury verdict alone, its decision to do so was supported, instead, by the addition of an unspecified value attributed to its post-trial Order for Injunctive

Relief. Without this additional value, there was clearly no basis for an award of case evaluation sanctions against these Defendants.

Defendants Schmitt and Rankin have vigorously opposed the trial court's consideration of its post-trial injunctive order as the necessary basis for an award of case evaluation sanctions to the Plaintiffs on several grounds, but all of their arguments were rejected by the trial court. Although the Court of Appeals properly agreed that it was not "fair . . . under all of the circumstances" for the trial court to award case evaluation sanctions based upon its post-trial injunctive order, it rejected Defendants' other challenges to the trial court's decision on this point.

Defendants contend that the trial court's consideration of its post-trial injunctive order for this purpose was manifestly erroneous for a number of reasons. It was clearly inappropriate for the trial court to base its decision upon this unspecified and largely immeasurable value because MCR 2.403(O)(5) does not allow consideration of the court's supplemental Order for Injunctive Relief to determine Plaintiffs' entitlement to case evaluation sanctions in this case, and because that Order was not a part of the "verdict" for purposes of determining liability for case evaluation sanctions under MCR 2.403(O). This was also highly inappropriate because no request for any form of equitable relief was made in either of the Plaintiffs' Complaints, no such request was considered by the case evaluators, and Plaintiffs' motion for injunctive relief was not filed until **after** the jury's verdict had plainly established that it was Defendant Schmitt, not the Plaintiffs, who was entitled to case evaluation sanctions.

Under these circumstances, the trial court should have seen Plaintiffs' belated request for injunctive relief for what it was – a transparent attempt to shift the responsibility for

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payment of case evaluation sanctions away from where that responsibility properly lay. The Court of Appeals has correctly determined that the trial court erred in considering its Order for Injunctive Relief as a basis for the case evaluation sanctions awarded in this case because it was not "fair ... under all of the circumstances" to do so. Although the Defendants applaud this part of the Court of Appeals' decision, they contend that the trial court's decision was also erroneous for the additional reasons, discussed below, which the Court of Appeals rejected.

A. THE STANDARDS OF REVIEW

The applicable standards of review are discussed in Issue I, *supra*.

B. MCR 2.403(O)(5) DOES NOT ALLOW CONSIDERATION OF THE TRIAL COURT'S SUPPLEMENTAL ORDER FOR INJUNCTIVE RELIEF TO DETERMINE PLAINTIFFS' ENTITLEMENT TO CASE EVALUATION SANCTIONS IN THIS CASE.

The trial court awarded case evaluation sanctions to the Plaintiffs in this case based upon MCR 2.403(O)(5), which provides that:

> "If the verdict awards equitable relief, costs may be awarded if the court determines that,
>
> (a) taking into account both monetary relief (adjusted as provided in subrule [O][3]) and equitable relief, the verdict is not more favorable to the rejecting party than the evaluation, and
>
> (b) it is fair to award costs under all of the circumstances."

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It must be noted, at the outset, that the trial court's reliance upon this provision was misplaced because it does not allow consideration of equitable relief to support an award of case evaluation sanctions to the Plaintiffs under the circumstances of this case. Under MCR 2.403(O)(1), a party who has rejected a case evaluation award must pay the opposing party's

actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. An additional requirement applies, however, where both parties have rejected. In that case, a party who has rejected the award may still be awarded case evaluation sanctions against the opposing party if the opposing party is liable for payment of sanctions, *i.e.*, the verdict was **not** more favorable to the opposing party than the case evaluation award, **and** the verdict **was** more favorable to the party requesting sanctions than the case evaluation award:

> "If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation."

The language of MCR 2.403(O)(5)(a) clearly suggests that its application was intended to be limited to the determination of whether the verdict was more favorable to the rejecting party against whom an award of case evaluation sanctions is sought. This subrule refers to a single "rejecting party" and provides that costs may be awarded where, "taking into account both monetary relief (adjusted as provided in subrule [O][3]) and equitable relief, the verdict is **not more favorable** to the rejecting party than the evaluation." (Emphasis added)

Thus, the language of the rule itself makes it clear that an award of equitable relief may be considered only insofar as it may be relevant to support a finding that the verdict was **not more favorable** to the rejecting party against whom the award is sought. The rule does not erode the requirement of MCR 2.40 (O)(1) that the verdict be **more favorable** to the Plaintiffs than the case evaluation award, nor does it include any language providing that equitable relief may be considered for purposes of determining whether the verdict was, in fact, **more favorable** to them. Presumably, if this Court had intended to allow consideration of equitable relief in determining whether a verdict was **more favorable** to a party seeking an

award of case evaluation sanctions under subrule (O)(1), it would have used other language to express that intent. It did not.

The Court of Appeals has grudgingly acknowledged that Defendants' argument in this regard is "technically correct," but has concluded, nonetheless, that "the trial court did not err in using MCR 2.403(O)(5) as a guide for this case, even though, by its terms, it does not technically apply." (Appendix "E" p. 6) This rather surprising pronouncement is plainly at odds with this Court's most basic rule of construction. This Court has often noted that, when called upon to construe a court rule, the Court applies the legal principles governing the construction and application of statutes. Thus, the Court begins with the plain language of the rule in question and, as in cases involving construction of statutes, when the language is unambiguous, the court enforces the meaning expressed without further judicial construction or interpretation. Haliw v City of Sterling Heights, *supra*, 471 Mich at 704-705; Grievance Administrator v Underwood, 462 Mich 188, 193-194; 612 NW 2d 116 (2000).

In light of this very well established principle, it was manifestly erroneous for the Court of Appeals to proclaim, in a published Opinion, that subrule (O)(5) may be used "as a guide," in this case although "by its terms, it does not technically apply." This, alone, is ample cause for this Court's intervention. The Court of Appeals made no finding that the language of subrule (O)(5) was in any way ambiguous; indeed, it acknowledged that it "does not, by its terms, contemplate the situation presented here." (Appendix "E" p. 6) Thus, the clear language of the rule should have been applied as written.

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C. THE TRIAL COURT'S POST-TRIAL ORDER FOR INJUNCTIVE RELIEF SHOULD NOT HAVE BEEN CONSIDERED A PART OF THE "VERDICT" FOR PURPOSES OF DETERMINING LIABILITY FOR CASE EVALUATION SANCTIONS.

Even if MCR 2.403(O)(5) allowed consideration of the trial court's post-trial Order for Injunctive Relief as a basis for awarding case evaluation sanctions to the Plaintiffs, the trial court's consideration of that Order for that purpose was inappropriate because that Order cannot be properly considered a part of the "verdict" for purposes of determining liability for payment of case evaluation sanctions in this case. Under MCR 2.403(O), a rejecting party's liability for payment of case evaluation sanctions is dependent upon whether the "verdict" is more favorable than the case evaluation award. Again, MCR 2.403(O)(1) provides that:

> "If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation."

For purposes of this rule, the term "verdict" is defined by MCR 2.403(O)(2) as:

"(a) a jury verdict,

(b) a judgment by the court after a nonjury trial,

(c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation."

The trial court's post-trial grant of injunctive relief does not constitute a part of the "verdict," as defined by this provision. Clearly, it was not a part of the jury verdict. Nor did it constitute a "judgment by the court after a non-jury trial" because there was no non-jury trial in this case. As noted previously, Plaintiffs had demanded their right to a jury trial, and thus, the case was tried to a jury. Plaintiffs did not make any request for a separate trial as to any

issue or claim pursuant to MCR 2.505(B), and thus, no separate trial or bifurcation of the trial proceedings was ordered. Furthermore, the trial court's Order for Injunctive Relief was not made a part of the trial court's judgment. That Order (Appendix "B") was entered separately on February 9, 2004. The trial court's separate Judgment (Appendix "A") was entered in accordance with the jury's verdict the next day, on February 10, 2004.

Plaintiffs have maintained, however, and the Court of Appeals has agreed, that the trial court's Order for Injunctive Relief was a part of the "verdict" under MCR 2.403(O)(2)(c) because it may be considered a "judgment entered as a result of a motion after rejection of the case evaluation." This conclusion is erroneous for two reasons. First, because the trial court's grant of injunctive relief was not a part of the Judgment entered in this matter, it cannot be considered a "judgment entered as a result of a motion after rejection of the case evaluation." Thus, by its clear terms, subrule (O)(2)(c) does not encompass the trial court's separate Order for Injunctive Relief.[33]

Second, the Court should recall that this part of the court rule definition of "verdict," was added by amendment in 1987, and further refined by additional amendments adopted in 1997. As this Court recently noted in the case of Haliw v City of Sterling Heights, *supra,* the purpose of the 1997 amendment was to clarify that mediation (now case evaluation) sanctions may be assessed in cases where a judgment has been entered as a result of a trial court's ruling on a dispositive motion:

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[33] In support of their argument that the trial court's injunctive Order may properly be deemed a "judgment entered as a result of a motion after rejection of the case evaluation," Plaintiffs have relied upon MCR 3.310(H), which provides that an injunction "may also be granted before or in conjunction with final judgment on a motion filed after an action is commenced. This provision does not support Plaintiffs' position, as its language plainly recognizes that there may often be a clear distinction, as there is in this case, between a "Judgment" and a separate Order granting injunctive relief.

"In 1997, this Court amended MCR 2.403(O) and changed the phrase in MCR 2.403(O)(1) from "the action proceeds to trial" to "the action proceeds to verdict." In support of its conclusion that appellate fees and costs are recoverable, the Court of Appeals relied on this amendment. The Court of Appeals reasoned that because this Court "de-emphasiz[ed]" a trial as the "determinative proceeding," this Court somehow intended that appellate attorney fees and costs should now be recoverable as case evaluation sanctions. *Haliw, supra* at 698. However, the purpose of the 1997 amendment was narrower than that assumed by the Court of Appeals and, thus, the amendment does not support the Court of Appeals rationale.

"**Until this Court amended MCR 2.403(O) in 1997, it was sufficiently unclear whether a judgment that entered as a result of a dispositive motion instead of a trial would engender sanctions. By amending the court rule, this Court clarified that case evaluation sanctions may indeed be available when a case is resolved after case evaluation by a dispositive motion.** As such, the Court of Appeals analysis went beyond the intent of the 1997 amendment and the actual language used in the amendment."

471 Mich at 708-709 (Emphasis added)

Thus, it may be seen that the clear purpose of MCR 2.403(O)(2)(c) is to allow assessment of case evaluation sanctions in cases where a judgment has been entered as a result of a trial court's ruling on a dispositive motion made after rejection of a case evaluation award. It is difficult to imagine that this provision was intended to be used, as it has been in this case, to provide an after-the-fact basis for an award of case evaluation sanctions in a case such as this, where the matter has been tried, and the jury's verdict is insufficient to support an award of case evaluation sanctions.

The Court of Appeals cited this Court's decision in Marketos v American Employers Insurance Co., 465 Mich 407; 633 NW 2d 371 (2001) as support for its conclusion that the trial court's separate Order for Injunctive Relief was a "judgment entered as a result of a ruling on a motion after rejection of the case evaluation," and thus, a part of the "verdict." The Defendants contend that the Court's reliance upon Marketos was misplaced, because the material facts of that that case are dramatically different from the facts of this case. Marketos

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did not involve a post-trial attempt, like one made here, to obtain additional relief, not requested in the pleadings or addressed at trial. The Court merely held, in that case, that the trial court had properly applied setoffs against the jury's factual findings regarding the value of the property at issue in determining the amount of the "verdict" for purposes of MCR 2.403(O). Those setoffs included credits for mortgage payments made by the defendant insurer on the property in question, and reductions required by the terms of the policy at issue regarding deductibles and policy limits.[34]

The Court's focus in Marketos was on whether the amount of the "verdict" could properly be adjusted by these setoffs, applied by the court as a matter of law, and the Court appropriately determined that "For purposes of awarding sanctions under MCR 2.403(O), a "verdict" must represent a finding of the amount that the prevailing party should be awarded." 456 Mich at 413-414. The Court's Opinion in Marketos does not mention subrule (O)(2)(c), nor does it contain any discussion as to whether the trial court's application of the setoffs constituted "a judgment entered as a result of a ruling on a motion after rejection of the case evaluation."

Obviously, the material facts of this case are very different. Here, the trial court's post-trial award of injunctive relief was not an adjustment of the jury's factual findings to determine the amount of money to be awarded in the court's judgment. It was, instead, a supplemental award of additional and different relief that was never requested in the pleadings or addressed at trial. Indeed, as Defendants have noted previously, the relief granted in the trial court's Order for Injunctive Relief was not even requested until **after** the jury's verdict

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[34] It is noteworthy that in Marketos, the jury was specifically instructed that these setoffs would be determined and applied by the court as a matter of law. 405 Mich 413-414.

had made it clear that the Plaintiffs were not entitled to the award of attorney fees that they had hoped for. Thus, it may be seen that the issue presented in this case was simply not addressed at all in Marketos.

For all of these reasons, the Defendants contend that the trial court's separate Order granting Plaintiffs' post-trial request for injunctive relief cannot be considered a part of the "verdict" under MCR 2.403(O)(2), and thus cannot be considered as a proper basis for assessment of case evaluation sanctions in this case under any circumstances.

IV. DEFENDANT JOYCE SCHMITT IS ENTITLED TO AN AWARD OF CASE EVALUATION SANCTIONS AGAINST ALL OF THE PLAINTIFFS.

As noted previously, the case evaluators awarded $17,500.00 to the Plaintiffs for their claims against Defendant Schmitt, but the jury awarded the Plaintiffs only $9,000.00 for those claims. Thus, it is plain that Defendant Schmitt's position was improved by far more than 10%. Plaintiffs' position was not improved, as previously discussed, and thus, Plaintiff Schmitt was entitled to an award of case evaluation sanctions against all of the Plaintiffs under MCR 2.403(O)(1). The lower court decisions to the contrary are manifestly erroneous, and should therefore be reversed.

A. THE STANDARDS OF REVIEW

The applicable standards of review are discussed in Issue I, *supra.*

B. DEFENDANT SCHMITT WAS ENTITLED TO CASE EVALUATION SANCTIONS UNDER MCR 2.403(O).

Based upon the jury's verdict, Defendant Schmitt clearly improved her position, and the Plaintiffs did not. Defendant Schmitt was therefore entitled to an award of case evaluation

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sanctions against the Plaintiffs under MCR 2.403(O)(1). As noted previously, the denial of Defendant Schmitt's request for case evaluation sanctions was improperly based upon the trial court's consideration of its post-judgment grant of injunctive relief as a part of the "verdict." This was clearly inappropriate, for all of the reasons previously discussed. The Court of Appeals' conclusion that Ms. Schmitt was liable for payment of case evaluation sanctions to Plaintiffs James and Kim Lindebaum is also clearly erroneous, for the reasons previously discussed. When the case evaluation court rules are correctly interpreted and applied, it is Defendant Schmitt who is entitled to an award of case evaluation sanctions in this case. The erroneous lower court decisions to the contrary should therefore be reversed.

RELIEF

WHEREFORE, Defendants-Appellants Joyce Schmitt and Diane Rankin respectfully request that this Honorable Court grant their Application for Leave to Appeal or other appropriate peremptory relief.

Respectfully submitted,

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